

91-616  
No.

Supreme Court, U.S.  
FILED  
OCT 15 1991  
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IN THE  
Supreme Court of the United States  
October Term 1991

STANLEY DILLER,

*Petitioner,*

v.

SELVIN & WEINER and  
ROBINSON, ROBINSON & PHILLIPS, INC.  
and  
DOROTHY DILLER,

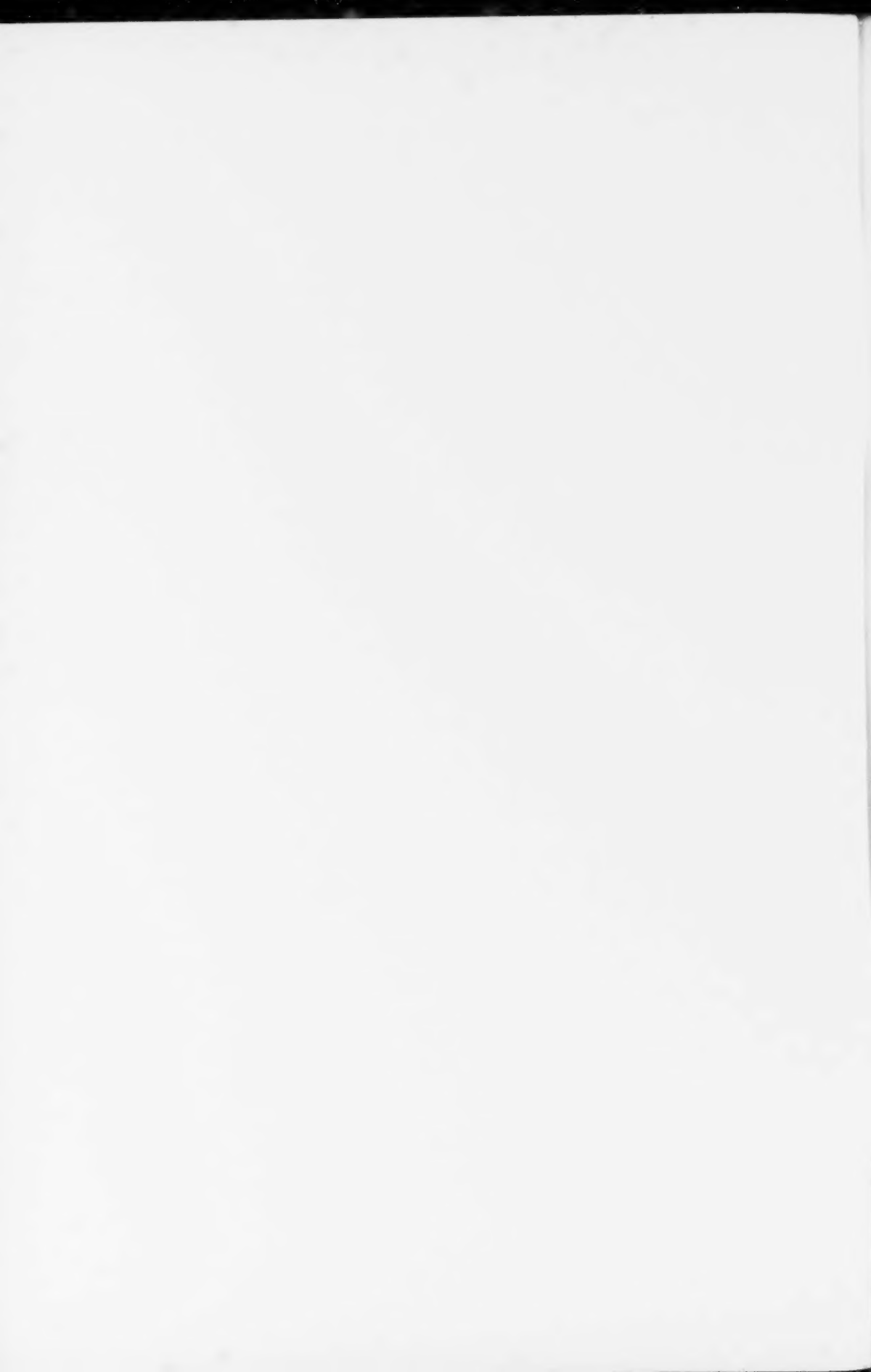
*Respondents.*

Petition for Writ of Certiorari to the Second  
Appellate District Court of Appeal of the State of California

PETITION FOR WRIT OF CERTIORARI

NATHAN LEWIN  
(Counsel of Record)  
BRADFORD M. BERRY  
MILLER, CASSIDY, LARROCA  
& LEWIN  
2555 M Street, N.W.  
Washington, D.C. 20037  
(202) 293-6400

*Attorneys for Petitioner*



## QUESTION PRESENTED

Whether parties in a divorce proceeding who contest their trial lawyers' application for more than three million dollars in fees and expenses have a Due Process right to be represented by retained counsel, who can cross-examine, present evidence, and argue the merits of their challenge to their trial lawyers' fee application.



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**Supreme Court of the United States**  
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DOROTHY DILLER,

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Petition for Writ of Certiorari to the Second  
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**PETITION FOR WRIT OF CERTIORARI**

**OPINIONS BELOW**

The California Supreme Court's denial of the Petition for Review (App. A, p. 1a, *infra*), is not reported. The decision of the Second Appellate District Court of Appeal (App. B, pp. 3a-20a, *infra*) is also not reported.

**JURISDICTION**

The decision of the District Court of Appeal was issued on May 3, 1991. A timely petition for rehearing was denied on May 31, 1991. A timely Petition for Review filed with the Supreme Court of California was denied on July 17, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

## STATEMENT

### 1. Divorce Proceedings Begin.

Stanley and Dorothy Diller were parties to a divorce proceeding that began with a petition for divorce filed by Dorothy in 1984. Husband and wife were initially represented by counsel whom each retained and paid. Less than two weeks before a trial scheduled for May 1986, Dorothy hired the firm of Selvin & Weiner to replace her previous lawyer. On the eve of a scheduled trial, a continuance was granted on Selvin & Weiner's request for additional discovery (R.T. 33-F)<sup>1</sup>.

### 2. A New Lawyer Enters.

While the trial was continued, Stanley Diller retained Robinson, Robinson & Phillips as additional counsel, and the Robinson firm became Stanley's lead counsel in February 1987 (R.T. 555). The trial began in August 1987, and conflicts between each of the parties and his or her counsel soon became obvious. Mr. Weiner indicated on the first day of trial that his client, Dorothy Diller, no longer had confidence in him (R.T. 701-02). In September 1987, Mr. Robinson requested leave to withdraw as Stanley Diller's counsel (R.T. 1634).

### 3. The Court Holds Counsel in the Case.

The trial judge insisted that trial counsel remain in the case, although he stated on the record that he was aware of conflicts between the parties and their counsel (R.T. 701-02, 1710). In October 1987, the parties, based upon the requests of the trial judge and the advice of their respective counsel, signed a stipulation designed to shorten the trial. With regard to attorneys' fees it provided:

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<sup>1</sup>"R.T." indicates the pages of the record prepared for the California Court of Appeal.

25. The Court will receive testimony and other evidence concerning attorneys' fees and litigation costs, the reasonable value thereof, the necessity thereof, the evaluation thereof, and the assessment, if any to either party, their respective attorneys and/or to the community. The court will permit each side one and one-half (1½) days on this issue after depositions have been taken of Weiner and Robinson (not to exceed three (3) hours each) and appropriate documentation has been filed setting forth the direct testimony of each attorney in connection with such claims for attorneys' fees and costs. The bulk of the court testimony is contemplated as cross examination of a particular declarant.

#### **4. The Trial Lawyers Request Interim Fees.**

In early December 1987, the trial attorneys submitted an order restraining husband and wife from transferring or disposing of community property valued at approximately \$850,000 (R.T. 429). Thereafter, at a session from which Stanley Diller was absent, his trial lawyer requested an award of interim fees, claiming that he had accumulated \$853,667 in fees and approximately \$200,000 in costs and had been paid only \$125,000 to that date (R.T. 4353-54).<sup>2</sup> Dorothy's attorney asked that he, too, be granted interim fees, claiming that there was a balance due him of \$862,724 in fees and \$51,837 in costs — in addition to the \$610,000 that Dorothy had paid him prior to that date (R.T. 4363).

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<sup>2</sup>Stanley Diller asserts that, when initially retained, his trial lawyer said that he would accept approximately \$125,000 as the complete fee for representing Mr. Diller in the entire proceeding.

### 5. Husband and Wife Hire Separate Counsel.

Dorothy retained separate counsel, Ed Saul, Esq., to represent her for purposes of the attorneys' interim fees claim. The trial judge stated on December 4, in open court (R.T. 4377-78):

I have ordered declarations in this case, subject to cross-examination by these lawyers, plus you [Mr. Saul] plus a lawyer — another lawyer, if Mr. Diller wants to hire him or her.

### 6. Husband Challenges the Fee Requests.

Immediately upon learning of the interim fee requests, Stanley Diller complained to the court about the exorbitant fees being requested by the lawyers for both sides. On December 7, Mr. Diller stated in open court (R.T. 4389-90)

[T]hese legal fees, needless to say, are way, way out of line, so excessive — I've been in business for 30 years. I've dealt with many, many lawyers. I've been through tremendous big transactions.

I've never experienced such legal fees, and I think it started with Mr. Weiner, and everybody wanted to follow his footsteps. He gave a pre[cedent] of going up with these outrageous legal fees which is not my business to say here —

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Your Honor, I appreciate the opportunity, but I do believe, you see, that when it comes to such high legal fees that I do believe some attorneys who are experienced in checking out legal fees should check out and see if they're correct.

Shortly thereafter, Mr. Diller retained separate counsel, Ronald Anteau, Esq., to contest the attorneys' fee requests.

### **7. The Court Awards Interim Fees.**

After hearing briefly from the parties' new counsel, the trial judge awarded interim fees and expenses of \$575,000 to the Robinson firm and \$483,239 to Selvin & Weiner without any prior discovery or cross-examination on the reasonableness or factual basis for the attorneys' fees (R.T. 4668-69). The judge reserved jurisdiction, however, "to determine the reasonable value of attorneys' fees and costs" (*id.*) The interim fee awards were paid, for the most part, from the \$850,000 in assets that had previously been frozen by the court at the joint request of the trial lawyers.

### **8. The Trial Ends.**

Trial testimony concluded on December 17, 1987, and the trial judge announced that final declarations for attorneys' fees and costs would have to be filed by January 4, 1988. He stated that a day of hearing would be required "for examination of anybody by Weiner, Saul, Robinson, and Anteau" (R.T. 4926).

### **9. The Husband's and Wife's Lawyers Are Barred.**

A hearing was scheduled for January 8, 1988, on the attorneys' fee applications. The judge denied written objections filed by separate counsel for the husband and wife to the interim award and declared, for the first time (R.T. 4931):

The court does not intend to permit Mr. Saul or Mr. Anteau to participate in this proceeding concerning attorneys' fees.

The trial judge described the issues as being "[w]hat are the petitioner's attorney fees and who should pay them? And

what are the respondent's attorneys' fees and who should pay them?" (R.T. 4932). He then refused again to hear from Dorothy's counsel, Mr. Saul, and stated that he saw "no reason" for Mr. Saul and Mr. Anteau to remain in the courtroom, and they were asked to leave (R.T. 4933).

Stanley Diller personally requested a continuance so that the attorneys' time sheets could be produced. His trial lawyer communicated this message to the court as an "accommodation" to Mr. Diller and stated his personal opinion that the requested information was unnecessary. The judge said he accepted the time representations made by counsel for both husband and wife and would decide only whether "they [the trial attorneys] should have spent that time" (R.T. 4937).

#### **10. Friendly Trial Counsel Question Each Other.**

The trial lawyers then took the stand and were "cross-examined" in friendly fashion by each other. Neither was asked to produce time records or justify the thousands of hours that each reported had been spent by his law firm on this litigation (R.T. 4939-66). The entire testimony of Messrs. Weiner and Robinson concerning their \$3 million fee requests covered only eighteen pages of the trial transcript.

#### **11. The Judge Again Silences the Lawyers.**

At the conclusion of the hearing on January 8, 1988, the trial judge announced that he would hear closing arguments on the entire case on January 15. He added, however, "I will not permit either Saul or Mr. Anteau to argue. As far as I am concerned, their work is done" (R.T. 5036). In closing argument, neither party's trial lawyer questioned the fees requested by the other (R.T. 5042-5120).

## 12. Each Trial Lawyer Gets Every Penny He Asks.

In the court's final order, the trial lawyers were granted every penny they requested. The judge's decision, filed on April 11, 1988, recited, in conclusory terms, that the fees of both firms were "fair, reasonably necessary, fair and proper." The judge awarded, as of that date, a total of \$1,768,791 as fees and expenses to Selvin & Weiner and \$1,238,257 to Robinson, Robinson & Phillips, plus ten percent interest per annum on all outstanding amounts. He ordered that each party's obligation to his or her lawyer be paid out of the community assets. The awards to the attorneys constituted nearly 30 percent of the husband and wife's then remaining community assets.

## 13. The Court of Appeals Affirms.

Stanley and Dorothy both appealed to the Second Appellate District Court of Appeal. They challenged the trial court's refusal to allow them to be represented by counsel of their own choosing in connection with the final fee petitions. Each argued that the court's bar violated the Due Process Clause of the Fourteenth Amendment and the California Constitution. On May 3, 1991, the Court of Appeal issued a decision upholding, in its entirety, the trial court's award of fees and costs to the attorneys. The Court of Appeal stated that if the Dillers' argument were adopted, it would "establish a rule that in every dissolution action where attorney fees and costs are in issue there would be a trial within the trial requiring additional counsel to cross-examine the trial counsel regarding his or her attorney fees and that an attorney would always have a conflict with his client when the court is asked to set and allocate attorney fees" (p. 16a, *infra*). Petitions for rehearing filed by both parties were denied on May 31, 1991. On July 17, 1991, the Supreme Court of California denied separate petitions for review filed by Stanley Diller and Dorothy Diller.

## REASONS FOR GRANTING THE WRIT

California is among seven States that permit judges in matrimonial actions to award attorneys' fees to trial lawyers without giving the party who must pay the fees an opportunity to be represented by separate counsel who might cross-examine the trial lawyer, as well as introduce evidence and argue in opposition to his fee request. In this case, the California rule means that husband and wife must together pay in excess of three million dollars in contested legal fees and expenses, having had no opportunity whatever to challenge their trial lawyers' fee requests and to make a record that could be reviewed in a higher court. The procedure sanctioned by California and at least six other States conflicts with the minimal due process requirements of the Fourteenth Amendment. At least eight States disagree with the California rule and have recognized in judicial decisions that a party to a matrimonial action, like any other party in litigation, is entitled to be heard in court through retained counsel and to present evidence and argument to contest his or her trial lawyer's fee application.

### ***1. California's Practice Conflicts With Constitutional Principles Articulated by This Court***

In *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), this Court said:

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. . . .

. . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal

would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

There is no more basic constitutional right than the right to be heard through retained counsel in any matter before a judicial tribunal that affects one's life, liberty, or property. This Court reaffirmed that right in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), declaring that the right to be heard "'must be granted at a meaningful time and in a meaningful manner,'" quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see *Connecticut v. Doeher*, 111 S. Ct. 2105, 2112 (1991). By refusing to permit the specially retained attorneys of Stanley and Dorothy Diller to appear on behalf of their clients in an adversary capacity vis-a-vis the Dillers' trial lawyers, the California courts denied the Dillers the legal assistance to "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests" of parties in litigation. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

The Court of Appeal rejected the constitutional claim on the ground that such a precedent would require "a trial within the trial" whenever, in a divorce proceeding, attorneys' fees are in issue. But that is an inadequate ground for denying a fundamental constitutional right. The Dillers should not be deprived of three million dollars — even on the application of their own trial lawyers — without being given an opportunity to contest the requested fees.

The parties' trial lawyers were not their advocates in challenging their own fee requests. Stanley Diller's trial lawyer had no real interest to test the validity or reasonableness of the fees requested by Dorothy Diller's trial lawyer, and Dorothy Diller's trial lawyer had no motive to challenge Stanley Diller's counsel. The *only* means of securing a truly adversary proceeding was to permit each client to contest his or her

own lawyer.<sup>3</sup> Yet the trial judge prevented such a clash by excluding the lawyers who had been separately retained by husband and wife to fight the trial lawyers' extraordinarily large demand for fees.

## ***2. This Court Should Resolve the Constitutional Conflict Among the States.***

The conflicting attitudes of state courts to the rights of parties in divorce cases to challenge their own trial lawyers' requests for fees is illustrated by comparing the present case with *Sadofsky v. Sadofsky*, 78 A.D.2d 520, 431 N.Y.S.2d 594 (2d Dep't. 1980), a New York case which reached the contrary result. In *Sadofsky*, the wife's trial lawyer applied for a fee after the parties had agreed to settle the divorce action and the judge said he would rule on counsel fees. As in this case, the husband and wife retained a new lawyer to challenge the trial lawyer's fee. The judge refused to hold a hearing and awarded a fee to the trial lawyer.

The New York appellate court reversed on the ground that the husband (who was to pay the fee) "was entitled to an evidentiary hearing so that the extent and value of respondent's services could have been scrutinized in an adversarial context by the trial court and intelligently reviewed by this one." 431 N.Y.S.2d at 595.

The California rule is that there is no right to an adversary

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<sup>3</sup>Had Stanley Diller been given an opportunity to be heard in opposition to his trial lawyer's enormous claim for attorneys' fees, he would have been able to show that much of the time spent — assuming all the time was adequately documented — was unnecessary. The trial lawyers acknowledged several times during the proceedings that no real benefit had resulted from the discovery conducted during the fifteen-month continuance of the trial. The clients were entitled to prove, as they were prepared to do, that the fees were escalated and magnified by unnecessary and unjustifiable makework.

evidentiary hearing before a trial court determines counsel fees on a contested fee application. It has been applied in a number of California cases, and was approved by the California Supreme Court in *Lipka v. Lipka*, 60 Cal. 2d 472 386 P.2d 671 (1963). Other States that appear to follow this rule are the District of Columbia (*Nolan v. Nolan*, 568 A.2d 479 (D.C. App. 1990)), Indiana (*Stigall v. Stigall*, 151 Ind. App. 26, 277 N.E.2d 802 (1972); *Burkhart v. Burkhardt*, 169 Ind. App. 588, 349 N.E.2d 707 (1976)), Minnesota (*Moberg v. Moberg*, 350 N.W.2d 421 (Minn. App. 1984)), Pennsylvania (*Young v. Young*, 274 Pa. Super. 298, 418 A.2d 415 (1980)), and Utah (*Porco v. Porco*, 752 P.2d 365 (Utah App. 1988)).

The New York rule illustrated by the *Sadofsky* case has been applied in other New York decisions. See, e.g., *Tarpinian v. Tarpinian*, 160 A.D.2d 1063, 553 N.Y.S.2d 546 (3d Dep't 1990); *Huntington v. Huntington*, 139 A.D.2d 493, 526 N.Y.S.2d 596 (2d Dep't 1988); *Johnston v. Johnston*, 115 A.D.2d 520, 496 N.Y.S.2d 50 (2d Dep't 1985). States that have followed the New York rule include Arizona (*Russo v. Russo*, 80 Ariz. 365, 298 P.2d 174 (1956)), Colorado (*In re Marriage of Kiefer*, 738 P.2d 54 (Colo. App. 1987)), New Jersey (*Mayer v. Mayer*, 180 N.J. Super. 164, 434 A.2d 614, *petition for certification denied*, 88 N.J. 494, 443 A.2d 709 (1981)), Oklahoma (*Mastromonaco v. Mastromonaco*, 751 P.2d 1106 (Okla. App. 1988)), Oregon (*In the Matter of Whitlow and Whitlow*, 79 Or. App. 555, 719 P.2d 1308 (1986)), and South Dakota (*Brennan v. Brennan*, 88 S.D. 541, 224 N.W.2d 192 (1974)).

In *Santee v. North*, 223 Kan. 171, 574 P.2d 191 (1977), the Kansas Supreme Court articulated the constitutional principle that, in our view, should govern this situation and should have been applied by the California courts (574 P.2d at 193);

The right to examine and cross-examine witnesses

testifying at any judicial or quasi-judicial hearing is an important requirement of due process . . . .

. . . Should it be any different when a lawyer sues a layman for a fee? We believe not and even though the amount of the fee allowed was adequately supported by evidence and statements of appellee's counsel the appellant should have been afforded the right to cross-examine and introduce what evidence he might have bearing on the reasonableness of the fee sought.

### ***3. The Constitutional Issue Affects Many Cases.***

The reported decisions on this subject are just the tip of the iceberg. Most of them involve applications for attorneys' fees that are relatively small. Parties subject to such orders are frequently unable or unwilling to appeal. Whether a contesting party is given a fair opportunity to challenge the size of a trial attorney's fee after a contested divorce is an issue that affects thousands of matrimonial cases on dockets across the country. Even a cursory review of the reported decisions discloses that there are differences between neighboring jurisdictions — not to speak of the difference between California and New York — over the protections that the Constitution affords in these circumstances.

This case is a particularly startling example of the gross inequity that results under the California rule. Attorneys who have claimed more than three million dollars in fees and expenses have been granted every penny they ask *with no adversary inquiry whatever*. The Due Process Clause of the Fourteenth Amendment is infringed by such a procedure.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN  
(Counsel of Record)  
BRADFORD M. BERRY  
MILLER, CASSIDY, LARROCA  
& LEWIN  
2555 M Street, N.W.  
Washington, D.C. 20037  
(202) 293-6400

*Attorneys for Petitioner*

October 1991



**APPENDIX A**

Second Appellate District, Division Seven, No. B035205

S021450

SUPREME COURT

FILED

JUL 17 1991

Robert Wandruff Clerk

DEPUTY

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

IN BANK

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DOROTHY DILLER, Appellant

v.

STANLEY Z. DILLER, Appellant

---

Petitions for review DENIED.

LUCAS

---

Chief Justice

APPENDIX B

OFFICE OF THE CLERK  
COURT OF APPEAL  
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT  
ROBERT N. WILSON, CLERK

DIVISION: 7 DATE: 05/31/91

Edward J. Horowitz  
11661 San Vicente Blvd.  
Suite 1015  
Los Angeles, CA 90049

RE: Diller, Dorothy  
vs.  
Diller, Stanley Z.  
Seivin & Weiner  
2 Civil B035205  
Los Angeles No. D118626

THE COURT:

PETITIONS FOR REHEARING ARE DENIED.

APPENDIX C

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

---

No. B035205

(Super. Ct. No. D118626)

In re the Marriage of Diller

DOROTHY DILLER,

*Appellant,*

and

STANLEY Z. DILLER,

*Appellant,*

---

SELVIN & WEINER, a Professional Corporation,

*Respondent,*

and

ROBINSON, ROBINSON & PHILLIPS, INC.,

*Respondent.*

---

APPEAL from an order for attorneys fees and costs as part of a Further Judgment on Reserved Issues of the Superior Court of Los Angeles County. Judge Robert F. Fainer, Judge. Affirmed.

APPEAL by appellant/petitioner, Dorothy Diller from Further Judgment on Reserved Issues entered April 11, 1988 awarding her trial attorneys Selvin and Weiner attorneys fees and costs payable from the community property of the parties.

APPEAL by appellant/respondent, Stanley Diller from Further Judgment on Reserved Issues entered April 11,

1988 awarding his trial attorneys, Robinson, Robinson and Phillips attorney fees and costs payable from the community property of the parties.

---

Goldfarb, Sturman, Averbach & Sturman and Martin B. Snyder, attorneys for appellant Dorothy Diller.

Edward J. Horowitz, A Professional Corporation, attorney for appellant Stanley Diller.

Selvin, Weiner & Ruben, and W. Ruel Walker, A Partnership Including Professional Corporations, attorneys for respondent Selvin & Weiner.

Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki, and Clark Heggeness, Joseph D. Mullender, Jr. attorneys for respondent Robinson, Robinson & Phillips.

### INTRODUCTION

The parties were married on December 18, 1955 and separated on May 1, 1984, petitioner Dorothy Diller filed a petition for dissolution of marriage on June 7, 1984. The parties had accumulated assets valued in excess of \$40,000,000, which after allowances for liabilities left the parties with net community assets valued between ten and fifteen million dollars. A Judgment of Dissolution of the marriage was filed on November 26, 1985 as to the status of the marriage only, all other issues were reserved for further hearing. The trial on the reserved issues was assigned to Judge Robert Fainer on May 19, 1986 and was trailed until August 10, 1987 when actual testimony commenced. The trial, with interruptions encompassed forty-nine days of testimony through December 17, 1987.

On December 4, 1987 motions were made by counsel for petitioner and respondent for an order for payment of interim attorney fees and costs. Each attorney had re-

ceived some fees and costs from their clients or by court order prior to this date, however, due to the nature of the litigation substantial fees and costs had accrued and been incurred which the respective attorneys had not been paid.

On December 14, 1987 Judge Fainer made an order for payment of interim fees and costs as follows: "The court orders interim fees to Mr. Weiner (attorney for petitioner) in the amount of \$431,362.00 plus \$51,877.00 costs paid out of the community funds and to Mr. Robinson (attorney for respondent). The amount of \$425,000.00 interim fees plus \$90,000.00 costs paid out of community funds. Additional fees will be decided when the case is over."

At the conclusion of the trial and after oral and written argument the court took the case under submission on January 15, 1988 and issued a Statement of Decision and Further Judgment on Reserved Issues on April 15, 1988. The court found the reasonable value of the services rendered and costs advanced by petitioner's counsel to be the sum of \$1,719,347.73 through January 31, 1988 plus \$49,444.00 for services and costs advanced after January 31, 1988 to the date of the entry of Further Judgment on Reserved Issues.

The court found the reasonable value of the services rendered and costs advanced by respondent's counsel to be the sum of \$1,216,607.23 through February 22, 1988 plus \$21,650.00 for services performed after February 22, 1988 to the date of the entry of Further Judgment. The court gave each party credit for fees and costs previously received by their counsel and deducted the amounts ordered pursuant to the interim order of December 14, 1987 and ordered that the balance due to each attorney after all credits be paid directly to the attorneys from the liquid community property of petitioner and respondent. The amount payable to Selvin and Weiner being \$785,742.00 and to Robinson, Robinson and Phillips \$680,525.00.

Both parties appealed the Judgment on Reserved Issues of April 11, 1988 insofar as the judgment awarded attorney fees to their respective counsel.

### *ISSUES*

1. Did the court have jurisdiction to make its interim order for attorney fees and costs on December 14, 1987?

2. Did the court have jurisdiction to make a final order for attorney fees and costs in its Further Judgment on Reserved Issues entered April 11, 1988?

3. Were the attorney fees and costs necessary to the litigation and reasonable in the amounts found by the court?

4. Were the parties afforded sufficient due process of law to present evidence to challenge the reasonableness and necessity of the attorney fees and costs made in the Judgment on Reserved Issues of April 11, 1988.

### *FACTS*

The long journey from the filing of the petition for dissolution to the entry of Judgment on Reserved Issues took 3 years and 10 months, during this period of time the parties engaged in a continuous legal battle in which neither party would concede any issue, even those of a minor nature, and demanded that their attorneys litigate each issue to the fullest. The original Order to Show Cause required thirteen days of testimony, the actual trial lasted forty-nine days. The court reporter's transcript consisted of twenty volumes for a total of 5165 pages. There were a total of 110 separate court appearances, dozens of hearings of motions filed by the parties 85 depositions and thousands of pages of exhibits. There were nineteen days of reference proceedings and it was necessary for the trial judge to write an 87 page Statement of Decision. The Judgment on Reserved Issues constituted 57 pages.

During the course of the litigation the court on several occasions called to the attention of the parties that due to their inability to resolve their differences and their insistence on litigating each minor issue that the attorney fees were escalating and would be in excess of \$1,000,000. No amount of advice from the judge deterred the parties from their obsession to grind on with the litigation, without concern as to its costs or consumption of time.

Near the conclusion of the trial when evidence was being presented regarding attorney fees and costs, with the concurrence of the trial judge each party consulted additional counsel to advise them with regard to the issues of assessment and allocation of attorney fees and costs.

### *DISCUSSION*

The court had jurisdiction to make its interim and final order for payment of attorney fees and costs from the community property.

In order to exercise some control over litigation which was becoming increasingly time consuming and expensive and unlikely to result in a settlement, the court met with the attorneys to set guidelines and limits regarding trial of the case. These discussions resulted in the signing and filing on October 19, 1987 of a document entitled "Consent, Waiver and Stipulation re Abbreviated Trial, etc. and Order". This document was signed by petitioner, respondent and their respective counsel. Based upon the stipulations the court signed the following order:

"The court is satisfied that the respective parties are aware of and understand the provisions, the advantages and disadvantages of their Consent, Waiver and Stipulation, and have entered into and consented to this Agreement freely, without coercion, duress or undue influence, with full advice of independent counsel other than their respective counsel of record, with awareness and knowledge of their rights to a full trial and knowledge and understanding of this abbreviated trial procedure.

"The waiver, consent and stipulation is accepted by the court and it is hereby *ORDERED* that the trial continue forthwith in conformity with this abbreviated trial procedure described in the Consent, Waiver and Stipulation."

Prior to entering into the stipulation setting forth the procedure to shorten the trial each party discussed the proposed stipulation with counsel other than their trial counsel and had ample opportunity to clarify, change or reject the agreement. The signed document states as follows:

"Both petitioner and respondent have consulted with counsel independent of their respective trial attorneys as to the wisdom and ramifications of entering into this stipulation, and based upon such consultation, each hereby agrees that he and she have read and understood this stipulation and the benefits and risks of the procedure contemplated and outlined herein, and that each further waives his or her respective rights to object to the abbreviated trial procedure as set forth herein."

Paragraph 25 established the procedure for determination of attorney fees, each counsel was to file documentation with the court setting forth their respective claims for attorney fees subject to cross-examination by the other counsel.

*Paragraph 25* "The court will receive testimony and other evidence concerning attorneys' fees and litigation costs, the reasonable value thereof, the necessity thereof, the evaluation thereof, and the assessment, if any, to either party, their respective attorneys and/or to the community. The court will permit each side one and one-half ( $1\frac{1}{2}$ ) days on this issue after depositions have been taken of Weiner and Robinson (not to exceed three (3) hours each) and appropriate documentation has been filed setting forth the direct

testimony of each attorney in connection with such claims for attorneys' fees and costs. The bulk of the court testimony is contemplated as cross examination of a particular declarant."

Notwithstanding any other legal basis the judge had for setting and assessing attorneys fees, the parties specifically conferred upon the court by their stipulations the jurisdiction to determine the necessity of the legal services and the reasonable value thereof, against whom the fees would be assessed or if the fees would be assessed against the community property.

The conduct of the parties throughout the litigation necessitated the court to control the proceedings so that the matter could be concluded within a reasonable period of time. If a trial could go on forever, this trial would have been a candidate for that dire distinction had not the trial judge guided and limited the proceedings. On various occasions during the time that Judge Fainer presided over this matter he discussed with the parties, advised and warned them of the escalating attorneys fees being incurred. The parties throughout the proceedings were hostile and bitter towards each other and demanded that their attorneys litigate minor issues resulting in unwise expenditure of the attorneys and court's time.

The experienced trial judge in this case who had the opportunity to observe the parties over a period of forty-nine days of trial and numerous motions and conferences set forth in his Statement of Decision his impression of the parties which help explain the large legal fees and costs of which the petitioner and respondent now complain.

*Page 5.* "The trial and attitude of the parties created great difficulties for the lawyers both in trying the action and in preparing for trial."

"There has been an unreasonable expenditure of court time and lawyer time on both sides, as well as

court appointed referee time, during the trial and during trial preparation, particularly in the period after the action was assigned to Dept. 19 for trial on 5/19/86 because of the evasive, contentious attitude of the parties."

"The personalities of the petitioner, the respondent and the claimants as well as their attitude towards each other and the litigation process . . . explain and justify the substantial time spent by the lawyers."

*Page 6.* "The petitioner . . . was obsessed with her beliefs and claims . . . that respondent was concealing community property assets. She asserted unprovable claims of misconduct by respondent and pursued property issues that had minimal value. . . ."

"The petitioner throughout the trial was a frightened bitter woman."

"The respondent is an avaricious, covetous, stubborn man. During the course of the trial Mr. Diller was evasive, unco-operative, distrustful, discourteous, unyielding and self righteous and was a manipulative litigant."

*Page 7.* "The parties exerted unreasonable and excess pressure on their lawyers."

"The respondent had almost daily disputes with his lawyers, indicating Mr. Diller's paranoia about the trial evidence and the significance of some of the trial evidence."

"While many of the petitioner's claims were unprovable and unrealistic, it was respondent, in his attempts to control, to dominate, and even to obstruct the trial preparation and the trial proceedings that caused the most notable and unreasonable delays and consumption of trial and lawyer time."

*Page 8.* "The time spent in document production and in discovery was exacerbated by the evasiveness, the

hostility and the uncontrolled contentiousness of Mr. Diller."

"The contributions of each to the length of the trial are too intertwined to be susceptible of division."

"The venality and the unrelenting, bitter belligerency of the parties made trial preparation and trial presentation difficult, oppressive and frustrating for the parties themselves, for their lawyers and for the court."

*Page 10.* "The hard realities of this unhappy case are that it was impossible to ever be ready for trial because neither party was ever going to accept any decision or solution to the distribution of property but their very own."

"The court notes that both Mr. Weiner and Mr. Robinson throughout the trial attempted to narrow the issues and reduce the trial in the face of objections by their respective clients."

In addition to the parties stipulating to the jurisdiction of the court to set attorney fees, both parties in their respective Petitions for Dissolution specifically requested the court to set, assess and allocate attorney fees. Additionally sections 4370 and 4370.5 of the California Civil Code provides the legislative basis for attorney fees in family law matters.<sup>1</sup>

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<sup>1</sup> "§ 4370. Costs and attorneys fees pendente lite; attorneys fees for enforcement of support order

"(a) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceed-

The court after hearing all of the evidence found that both counsel had rendered their professional services with the same expertise, care and skill ordinarily and usually used in family law actions in the Central District of the Superior Court of Los Angeles County. There is nothing in the record to indicate otherwise. The court further found that the fees and costs reimbursements were reasonable, proper and necessary.

On December 4, 1987 during the trial on reserved issues, counsel for respondent, Robinson, Robinson and Phillips made an oral motion for interim attorney fees

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ing related thereto, including after any appeal has been concluded. . . .

“(b) During the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys’ fees or costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court *in either of the following cases*:

“(1) At the time of the hearing of the cause on the merits . . .

“§ 4370.5. Justness and reasonableness of award by court; considerations; order of payment

“(a) The court may make an award under this chapter where the making of the award, and the amount of the award, is just and reasonable under the circumstances of the respective parties.

“(b) In determining what is just and reasonable under the circumstances, the court shall take into consideration both of the following:

“(1) The need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into consideration to the extent relevant the circumstances of the respective parties described in subdivision (a) of Section 4801.

“ . . . .

“(c) The court may order payment of the award from any type of property, whether community or separate, principal or income.”

and costs. This motion was not opposed by petitioner's counsel Selvin and Weiner, who made their own motion for interim fees and costs. Both parties in their appeal urge that the court lacked jurisdiction to order interim fees and costs, however, a review of the court file indicates that petitioner in sixteen separate documents filed with the court requested interim fees and filed four specific Orders to Show Cause requesting interim fees, final fees and costs on June 7, 1984, February 25, 1985, December 16, 1985 and April 13, 1987. In the April 13, 1987 Order to Show Cause she requested \$567,835.65 attorney fees and \$33,082.94 in costs. Respondent, husband filed multiple documents with the court in response to the Order to Show Causes by petitioner in which he requested interim fees, final fees and costs against petitioner.

In arriving at its determination setting attorney fees the court had before it numerous and lengthy declarations and financial documents filed in a period of four years. There was ample evidence before the court upon which it could base an attorney fee order. On December 10, 1987 petitioner's counsel filed a declaration and exhibits regarding attorney fees constituting 439 pages which was supplemented on January 4, 1988 with an additional 304 pages. Respondent's counsel filed a declaration and exhibits documenting his attorney fees which constituted 123 pages. In the four years prior to December 1987 the parties filed declarations and exhibits directed towards attorney fees which involved several hundred pages.

The parties having acted unwisely during the entire course of the litigation had incurred substantial fees and costs due to their respective attorneys which were mostly unpaid in December 1987. The attorneys had carried the cost of the litigation and were financially hurting and not receiving funds from their clients in that court ordered restraining orders tied up the community

assets and neither party had separate funds to pay attorney fees. Realizing the court was about to order the payment of the majority of the attorney fees incurred to date, after three days of hearings on attorney fees and costs December 2, December 3 and December 4, 1987 the parties without their counsel signed a petition on December 6, 1987 in which the husband and wife agreed to pay their own attorney fees and resolving other issues thus withdrawing the issue of attorney fees from the court.

The stipulation was presented to the court on December 10, 1987 after another two days of testimony regarding attorney fees. This stipulation, if valid, would have required counsel to bring an independent action against their clients in separate lawsuits for attorney fees which would have delayed payment of attorney fees for several years.

On December 10, 1987 the court advised the wife that he considered the stipulation unfair to her and suggested she consult an independent counsel whom she had previously consulted regarding the August 1987 stipulation and attorney fees. On December 11, 1987 the petitioner renounced her signature to the stipulation and the stipulation was withdrawn. The court on December 14, 1987 ordered payment of interim attorney fees and costs.

In the case of *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1218, 1221, the wife applied to the court for an interim attorney fee order which the trial court denied stating the court did not grant interim fee orders. The wife in order to prepare her case required an actuary and an appraiser, and did not have funds to pay her attorney. The appeals court ordered interim attorney fees to the wife stating:

"The public policy of California strongly favors settlement as the primary means of resolving legal disputes. . . . This result can most easily and most rapidly be reached where each spouse has reasonable

and able counsel representing them with some assurance they will be fairly compensated for their services consistent with the financial circumstances of the parties."

The court further stated:

"Unfortunately it is often true that the financial circumstances of spouses at the breakup of marriages do not permit timely payment of counsel for services as they are rendered and, in fact, counsel for financially disadvantaged spouses rarely receive final payment until long after the litigation is over. However, the courts should not make a bad situation worse. The suggestion of the trial court that attorneys handling marital dissolution cases must be prepared to 'carry the client until the time of trial' is not only demeaning to attorneys handling family law cases, it fails to consider the present day realities of the economics of the practice of law. . . . Given the complexity of modern day family law litigation and the significance of this litigation to our society, courts should be doing everything they can to encourage, not discourage, able attorneys to handle family law cases.'

". . . The approach suggested by the trial court would . . . compel the attorney to finance the litigation by deferring receipt of payment for services until months or years after they are performed, while the attorney would have to personally advance the costs of overhead attributable to the case. Even worse, it would require attorneys to advance from their own pockets sizable expenditures required as a matter of course in such litigation, such as expense for depositions and experts. Banks and finance companies are licensed for the purpose of lending money; lawyers are not."

Judge Fainer properly ordered payment of interim attorney fees from the liquid community assets.

Consistent with their prior attempt to delay payment of attorney fees after entry of the Further Judgment on Reserved Issues, the parties again without counsel signed a new stipulation stating regardless of Further Judgment by the court;

1. Each party would bear their own attorney fees and costs.

2. Withdrawing respective pending motions for a new trial, and

3. Modifying the Further Judgment to delete any reference to attorney fees or costs. Subsequent to this stipulation both parties have filed malpractice actions against their respective counsel.

The parties were afforded due process of law to present evidence to challenge the reasonableness and necessity of the attorney fees and costs ordered by the court in the Judgment on Reserved Issues of April 11, 1988.

Petitioner and respondent both contend that the portions of the judgment they appeal from should be reversed because the trial court allegedly denied due process of law by determining the amounts of fees and costs which it awarded based upon their attorneys' written declarations and supporting documentation and without permitting them to have their independent counsel cross-examine their attorneys. To adopt this argument would establish a rule that in every dissolution action where attorney fees and costs are in issue there would be a trial within the trial requiring additional counsel to cross-examine the trial counsel regarding his or her attorney fees and that an attorney would always have a conflict with his client when the court is asked to set and allocate attorney fees.

The parties by their stipulation of October 19, 1987 conferred upon the court the jurisdiction to determine the necessity and reasonableness of the attorney fees and to allocate payment to either party or to the community.

Additionally the parties agreed that "the court will have full discretion to limit direct and cross-examination and the introduction of other evidence. . . ." This agreement was signed by both parties and their counsel. Additionally each party consulted other counsel prior to signing the stipulation.

In a similar factual situation *In re the Marriage of Berlin* (1976) 54 Cal.App.3d 547, the parties were engaged in a bitter dispute over the division of a large amount of community property. The parties arrived at a stipulation settling all issues but attorney fees and costs and stipulating to submit the issue of attorneys fees and costs to the court, and that the attorney fees would be paid out of the community property. The court awarded \$10,000.00 fees to each attorney and both parties appealed. The appeals court affirmed stating, "The trial court had jurisdiction to award attorney fees to both counsel to be paid out of the community property if the parties so agreed."

The court had substantial evidence before it to determine the necessity, reasonableness and amount of the attorney fees and costs. As previously discussed the court file contained declaration and exhibits relating to the financial affairs of the parties, financial declaration and business records. These records if bound would contain enough pages to constitute several novels, although none would make the best seller list.

Many days of testimony were taken on financial matters, several days relating to attorney fees and costs only. Both trial counsel took the stand and were cross-examined by the other counsel as to attorney fees and costs. Office records were produced. On January 8, 1988 Judge Fainer decided he did not need additional evidence to determine the reasonableness and necessity of attorney fees and costs and their allocation. On January 8, 1988 the entire day was spent presenting the testimony of petitioner, respondent, attorneys and witnesses regarding the allocation of

attorney fees. Thereafter, counsel submitted written arguments to the court.

Throughout the trial each party argued that the other party should pay all of the attorney fees for both parties. The allocation of payment was argued more often and strenuously than the amounts. The court found both parties were at fault in causing the trial to far exceed the time it should take to try such a case and thus ordered all of the attorney fees and costs to be paid from the community property.

Each attorney had submitted to the court extensive bills and invoices showing the number of hours spent on the case and describing the work performed and the hourly rate.

A trial judge in a family law matter observes the parties and counsel throughout the trial and evaluates the evidences and is in the unique position to see the whole picture and all its individual parts as it is being painted. A separate proceeding introducing additional counsel on the issue of attorney fees would require additional time, result in compounding the attorney fees and further burden an already strained court system. During the trial the court is able to ascertain the time spent by counsel and the necessity of the work and the reasonable value of the attorney's services.

In *Jones v. Jones* (1955) 135 Cal.App. 52, 64, the court in affirming a trial court's awarding of attorney fees stated that direct evidence of the reasonable value of attorney fees need not be introduced.

"Evidence as to such reasonable value of services is necessarily before the trial court when it hears a case. The trial judge, being a lawyer, can readily ascertain from the presentation of the case the approximate time spent in preparation and trial, and the relative financial circumstances of the parties. The trial court has a wide discretion in fixing the

fee, which can be upset only for an abuse of discretion."

Petitioner argued strenuously that respondent should pay all the attorney fees and costs and respondent argued that petitioner should pay all the attorney fees and costs contending her unreasonable demands caused the lengthy trial and large attorney fees and costs.

Both parties were successful in that petitioner was not required to pay respondent's fees, nor he pay hers. All of the attorney fees and costs were ordered paid out of the community property. The court exercised its discretion from its review of all of the evidence.

"The question of the reasonableness of an order for attorney fees is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse, not presumed but affirmatively established, its determination will not be disturbed on appeal." (*In re Marriage of Gonzales* (1976) 57 Cal. App.3d 736, 749.)

The court further stated:

" 'A reviewing court is not authorized to revise the lower court's judgment even if it should be of the opinion that it would have made a different award had the matter been submitted to its judgment in the first instance, in the absence of a clear abuse of discretion.' 'The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . . It is settled that a judge may rely upon his own experience and knowledge of the law practice, as well as on the facts and circumstances of the case as they appear from pleadings and other papers.' "

The court had jurisdiction to make both the interim order and judgment for attorney fees and costs. Although the attorney fees and costs are extremely high and this writer is concerned that they taint the quality of the system, the parties by their actions and conduct caused this aberration and under the circumstances the services performed by the attorneys was necessary and the fees and costs reasonable. The parties were afforded due process in the setting of the fees by the court.

### *DISPOSITION*

The interim order for attorney fees and the Further Judgment on Reserved Issues is affirmed.

KALIN, J.\*

We concur:

LILLIE, P.J.

WOODS (Fred), J.

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\* Assigned by the Chairperson of the Judicial Council.



(2)  
No. 91-616

Supreme Court, U.S.  
FILED

NOV 12 1991

OFFICE OF THE CLERK

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IN THE  
SUPREME COURT  
OF THE UNITED STATES

October Term, 1991

STANLEY DILLER,  
Petitioner,  
vs.  
SELVIN & WEINER and  
ROBINSON, ROBINSON &  
PHILLIPS, INC. and  
DOROTHY DILLER,  
Respondents.

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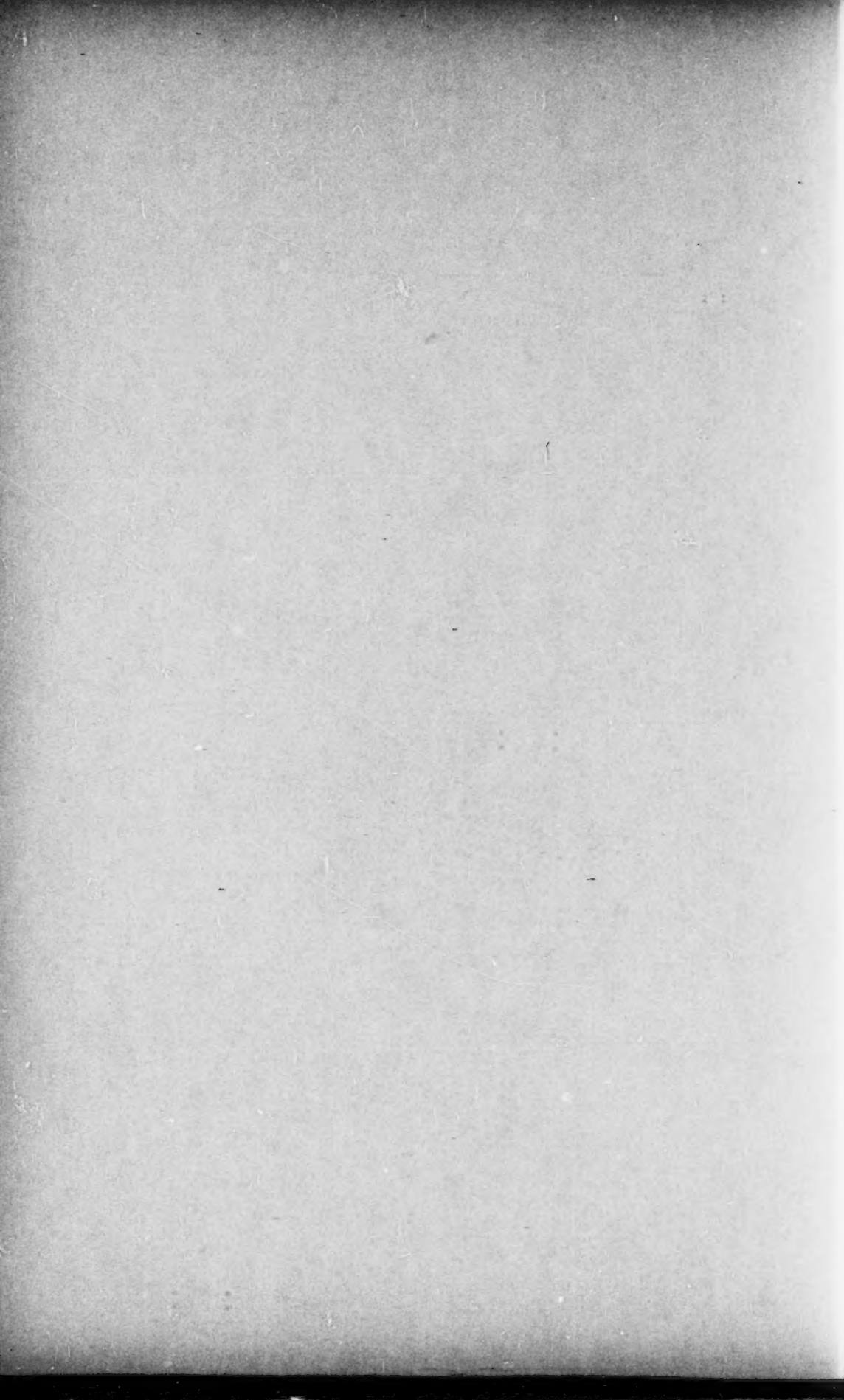
PETITION FOR WRIT OF CERTIORARI TO THE  
SECOND APPELLATE DISTRICT COURT OF APPEAL  
OF THE STATE OF CALIFORNIA

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BRIEF OF ROBINSON, ROBINSON & PHILLIPS, INC.  
IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

JOSEPH D. MULLENDER, JR.  
(Counsel of Record)  
CLARK HEGGENESS  
CARLSMITH BALL WICHMAN MURRAY  
CASE MAUKAI & ICHIKI  
301 East Ocean Boulevard  
Long Beach, California 90802  
(310) 435-5631  
Attorneys for Respondent  
ROBINSON, ROBINSON & PHILLIPS  
INC.

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## QUESTION PRESENTED

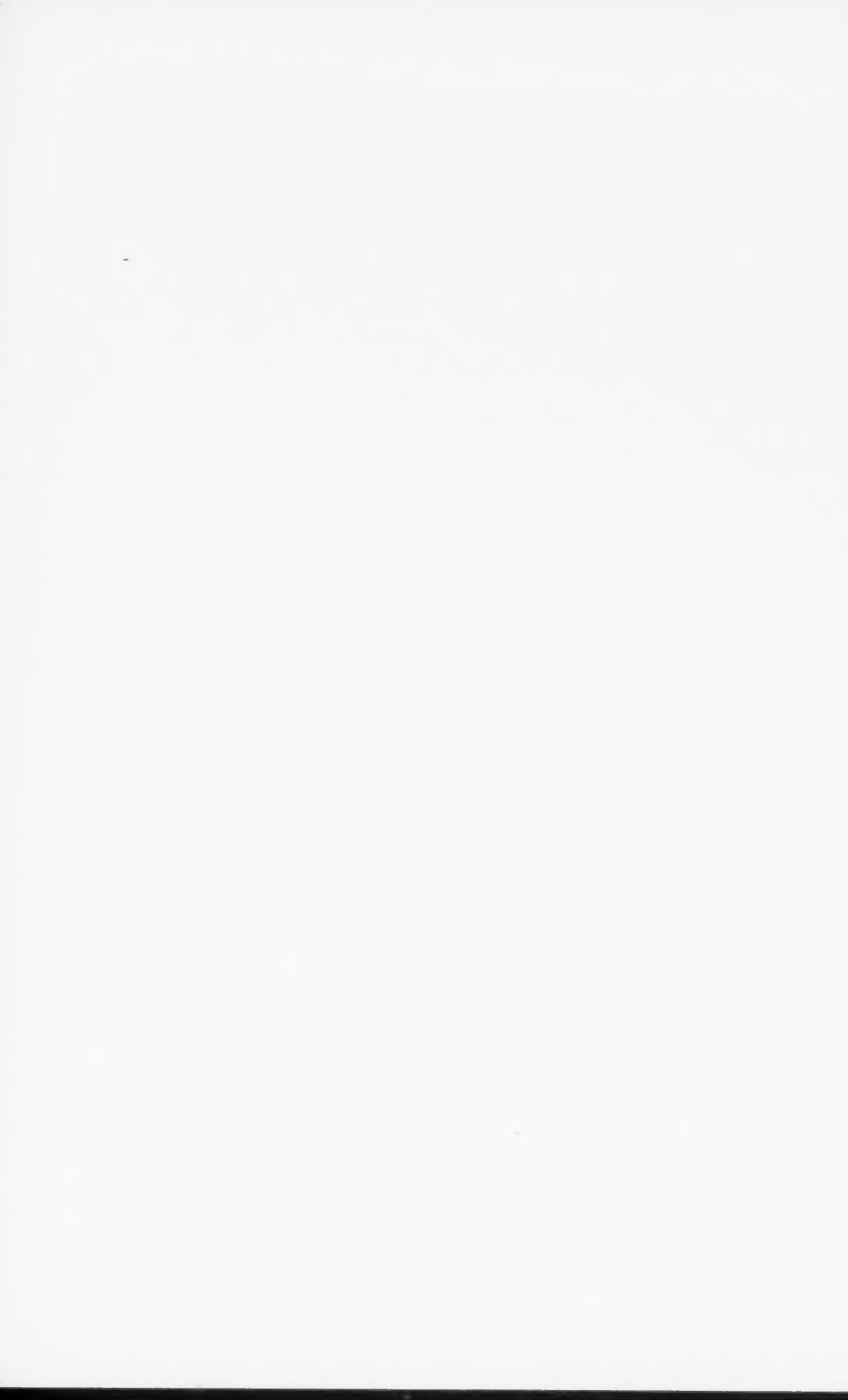
Whether a party in a divorce proceeding, who requests the court to make an award of the party's attorney's fees and litigation costs against the other party or out of the community property, and who instructs his attorney of record to make an application in support of the request for the award, has a Due Process right to have another attorney contest the application which the party's attorney of record makes on behalf of the party.



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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1991

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STANLEY DILLER,  
Petitioner,  
v.

SELVIN & WEINER and  
ROBINSON, ROBINSON & PHILLIPS, INC.  
and  
DOROTHY DILLER,  
Respondents.

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Petition for Writ of Certiorari  
to the Second Appellate District  
Court of Appeal of the  
State of California

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BRIEF OF ROBINSON, ROBINSON &  
PHILLIPS, INC. IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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Respondent Robinson, Robinson & Phillips,  
Inc. respectfully requests this Court to  
deny the petition of Stanley Diller for a  
writ of certiorari to the Second Appellate

District Court of Appeal of the State of California.

1. Statement of the Case

This case does not present a due process question. The petitioner tries to make it appear that it does by characterizing it as a case where the court awarded fees to the attorneys against their own clients. Nothing could be further from the truth. The case that was tried, insofar as attorneys' fees are concerned, was a claim by the wife that her fees should be awarded against the husband or out of the community property, and a claim by the husband that his fees should be awarded against the wife or out of the community property. The court granted the relief requested by both parties

by awarding the fees of both from the community property. The only unusual thing about this case is that the parties were uncommonly wealthy and extremely litigious. In principle it is in fact a garden variety divorce case in which every contention of either party was fully and fairly tried by a highly experienced and competent judge.

## 2. Summary of California Law

California courts do not deny due process when they determine a claim for attorney's fees between an attorney and his own client. Whenever that kind of a claim is made, the client, like any other defendant, is entitled to have counsel to cross-examine, present evidence, and argue in opposition to the plaintiff's claim.

Under California law a dispute between an attorney and his own client may not be tried in a divorce case or any other case when the attorney still represents the client.

California law does not allow the attorney for a party in a divorce case to sue his own client for fees or costs in the divorce case. The attorney must bring a separate action against his client if he contends that the client owes him fees or costs incurred in the divorce case. (Wong v. Superior Court, 246 Cal.App.2d 541, 54 Cal.Rptr. 782 (1966); Marshank v. Superior Court, 180 Cal.App.2d 602, 4 Cal.Rptr. 593 (1960).)

The jurisdiction of the court in a divorce case, in respect of attorney's fees

and costs, is limited to awarding the fees and costs of one party, at his or her request as a part of the prayer for relief, against the other party, or from the community property. The traditional basis for making an award of attorney's fees and costs in a divorce case is the financial need of the requesting party compared to the ability to pay of the other party. Since 1985, the courts have been, and now are, additionally authorized to award attorney's fees and costs as a sanction when the conduct of the party against whom the award is made, or his or her attorney, frustrates the policy of the law to promote settlement of litigation and to reduce the cost of litigation by encouraging cooperation between the parties and the attorneys. (California Civil Code sections 4370,

4370.5, 4370.6.)

A party who requests an award of attorney's fees and costs in a divorce case or any other case is not entitled to have another attorney contest his application for the award. No party has any right to contest his own prayer for relief in any manner. A party may make any claim he wishes, and may withdraw or modify his claim before the court adjudicates it. But no one is entitled to oppose his own claim. If the party does not want his attorney to apply for the award or does not want to apply for all of the fees and costs his attorney claims, the party may instruct his attorney either not to apply for the award or to limit the application to the amount the party wants to claim. The attorney must

then sue the client in a separate action for any fees or costs he claims the client owes, and the client is then entitled to have another attorney contest the claim.

When an award of attorney's fees and costs is made, it may be made payable directly to the attorney for the party who requested the award. (California Civil Code section 4371.) If the award is made payable to the attorney, the attorney is entitled to enforce it, and his client is relieved of the obligation to pay his attorney's fees and costs to the extent they are paid by the other party pursuant to the award.

### 3. Statement of Facts

Mark Robinson of Robinson, Robinson & Phillips was the attorney for the husband,

Stanley Diller, in the trial of the Diller divorce case. He obtained for the husband an award of all of his unpaid attorney's fees and costs from the community property. Much of the time in divorce proceedings the husband is required to pay his fees as well as his wife's from his separate assets rather than, as here, where his wife is paying one half of his fees as well as of her own out of the community.

The husband had two attorneys, Ronald Anteau and Mark Robinson. Anteau was his first attorney. Robinson was substituted to try the case. The husband wanted Anteau to act as co-counsel with Robinson, but Anteau's law firm would not agree to that. Although Anteau was not an attorney of

record in the trial, the husband continued to utilize his services as "independent" counsel from time to time. Robinson and Anteau were not antagonistic to each other. They at all times attempted to minimize whatever inconsistencies in the positions they were sometimes required to take by the husband.

The husband's contention that he disputed the amount of his own attorneys' fees and was denied the opportunity to cross-examine or present evidence on that issue is not apparent from a reading of the record. The record shows the husband's contention throughout the trial was that his attorney should claim all of his fees and attempt to have them awarded against the wife or out of the community property. Ronald Anteau, his

"independent" counsel, took the same position. He supported the husband's trial attorney on his fee claim. There is no inference available from the evidence that the husband or his "independent" counsel would have sought to minimize the husband's attorney fee claim if given the opportunity to do so. That would have undermined the husband's basic position in the lawsuit that the enormous component of time used by his attorney was a direct result of the wife's unconsonably vexatious positions throughout the proceedings.

There was no conflict of interest between Robinson and the husband. Robinson did ask to withdraw at the beginning of the trial in September 1987, but that was because the husband was not paying his fees, not because

of any conflict of interest. The husband had paid a retainer when he hired Robinson and had agreed to pay his fees and costs as incurred on an hourly basis. But he was unable to continue paying at that time because he had so many other obligations that were draining his liquid assets. The judge did not allow Robinson to withdraw, and this situation continued throughout the trial. There was never an argument over the amount of Robinson's bills. Whenever Robinson asked for partial payment the husband would tell him that he would like to pay but did not have the money to do so. He never claimed that he did not owe the fees and costs which continued to mount.

Toward the end of the trial, in December 1987, the husband re-employed Anteau to

negotiate a settlement with the wife and her "independent" counsel. Robinson was not included in the settlement negotiations or in the attempt to uphold the agreement. His instructions were to continue with the trial. A settlement agreement was signed and presented to the court, but within a few days the wife instructed her trial attorney to move to rescind it. Anteau represented the husband at the hearing of the motion and presented evidence in opposition. When the motion to rescind was granted, Anteau specifically advised the court that Robinson's authority to press the husband's attorney fee claim had not been withdrawn by the settlement agreement. Anteau was one of Robinson's principal witnesses on the husband's attorney fee claim. The husband claimed that all of his attorney's fees and

costs should be assessed to the wife or the community property as a sanction because of her conduct in prolonging the litigation. Anteau testified on this issue during the settlement negotiations, at the conclusion of the trial after the agreement was rescinded, and at the hearing in January 1988 when the court allegedly denied due process.

#### 4. Argument

The due process claim hinges entirely on the fact that the judge told Anteau and the wife's independent counsel during the trial that they would be allowed to participate at the hearing in January, and then advised them at the hearing that they would not be allowed to participate. The reason was that

it was initially contemplated that the purpose of the January hearing would be to determine the amounts of the attorney fee claims, but the judge later decided that the documentation of the fee claims, together with his own observations (the judge himself was a witness to the work performed by the attorneys), was sufficient to determine that issue.

The husband does not claim there was a denial of due process because the quality of the evidence was insufficient.

His contention is that he was denied due process because Anteau was not allowed to cross-examine. The problem with this argument is that even if Anteau had cross-examined, he would not have cross-examined Robinson. Robinson and Anteau were

asserting the husband's claim for fees. All Anteau could have done would have been to assist Robinson in cross-examining the wife's attorney on the wife's claim for fees.

## 5. Conclusion

The petition for a writ of certiorari should be denied for two reasons:

One. If, as the petitioner contends, there are States that permit judges in matrimonial actions to award attorneys' fees to lawyers without giving the party who must pay the fees an opportunity to be represented and defend, California is not one of them. In California fees may only be awarded to one party against the other, and

the party who must pay is entitled to be represented and defend against the attorney fee claim. In California no lawyer is allowed to sue his own client in a divorce case or any other case in which he still represents the client.

Two. The facts of this case do not support the petitioner's due process argument. Robinson never claimed fees from his own client in the divorce case. The attorney fee claim he made was the husband's claim for an award of fees against the wife or out of the community property. The husband's independent counsel would not have cross-examined Robinson even if he had been allowed to do so because it would have been counter-productive to the husband's position that his attorney had been required to spend

exceptional quantities of time responding to wife's incessant and litigious tactics.

Now, husband and wife have curiously joined forces to contest the court's decision in so far as it affects each of them. However, obtaining "due process" is not their real motivation.

Date: November 13, 1991

JOSEPH D. MULLENDER, JR.  
(Counsel of Record)  
CLARK HEGGENESS  
CARLSMITH BALL WICHMAN  
MURRAY CASE MUKAI & ICHIKI

Attorneys for Respondent  
Robinson, Robinson & Phillips, Inc.



## APPENDIX A



## APPENDIX A

§ 4370.. Costs and attorney fees pendente lite; attorneys fees for enforcement of support order

(a) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorney's fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded. In respect to services rendered or costs incurred after the entry of judgment, the court may award

such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify any award so made, including after any appeal has been concluded. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding. Any order for a party who is not the husband or wife of another party to the proceedings to pay attorneys' fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

(b) during the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or

costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court in either of the following cases:

(1) At the time of the hearing of the cause on the merits.

(2) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

(c) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to pay, shall award reasonable attorneys' fees to a custodial parent in any action to enforce an existing order for child support.

(d) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to

pay, shall award reasonable attorneys' fees to a supported spouse in any action to enforce an existing order for spousal support. (Added by Stats. 1970), c. 311, §1. Amended by Stats. 1979, c. 1030, §2; Stats. 1981, c. 715, §1; Stats. 1984, c. 359, §1.)

APPENDIX B



## APPENDIX B

§ 4370.5. Justness and reasonableness of award by court; considerations; order of payment

(a) The court may make an award of attorneys' fees and costs under this chapter where the making of the award, and the amount of the award, is just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into consideration to the extent relevant the circumstances of the respective parties described in

subdivision (a) of Section 4801. The fact that the party requesting an award of attorneys' fees and costs has the resources from which he or she could pay his or her own attorneys' fees and costs is not itself a bar to an order that the other party pay part, or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

(c) The court may order payment of an award from any type of property, whether community or separate, principal or income. (Added by Stats. 1985, c. 362, §1. Amended by Stats. 1989, c. 1105, §3; Stats. 1990, c. 893 (A.B.2686), §1.)

APPENDIX C



## APPENDIX C

\$4370.6. Alternative basis for award by court; encouraging cooperation; award as sanction; notice; property or income of sanctioned party

(a) Notwithstanding Sections 4370 and 4370.5, the court may base an award of attorneys' fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties incomes,

assets, and abilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden upon the party against whom the sanction is imposed. In order to obtain an award under this section the party requesting an award of attorneys' fees and costs is not required to demonstrate any financial need for the award.

(b) An award of fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award of fees and costs as a sanction pursuant to this section shall be payable only from the property or income of the party against whom the sanction is imposed, except that the award may be

against the sanctioned party's share of the  
community property. (Affid by Stats. 1990,  
c. 893 (A.B. 2686), §2)



## APPENDIX D



## APPENDIX D

§4371. Attorney fees and costs; direct payment; enforcement

When the court orders one of the parties to pay costs and attorneys' fees for the benefit of the other party, such costs and fees may, in the discretion of the court, be made payable in whole or in part to the attorney entitled thereto. An order of the court providing for payment of such costs and fees may be enforced directly by such attorney in his own name or by the party in whose behalf such order was made, provided that if such attorney has ceased to be such, it shall be a condition of such enforcement, and must appear of record, that such attorney shall have given to his former client or successor counsel 10 days' written notice of his application for such

enforcement, and during such period the client may file in such proceeding a motion directed to such former attorney for partial or total reallocation of fees and costs to cover the services and cost of successor counsel, in which event such proceeding shall be stayed until the court has resolved such motion. (Added by Stats. 1970, c. 311, §1.)



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

IN RE THE MARRIAGE OF DILLER

DOROTHY DILLER,  
and *Petitioner,*

STANLEY Z. DILLER,  
*Petitioner,*

SELVIN & WEINER, a Prof. Corp.,  
and *Respondent,*

ROBINSON, ROBINSON & PHILLIPS, INC.,  
*Respondent.*

On Petition for Writ of Certiorari to the  
Second Appellate District Court of the State of California

**RESPONDENT'S BRIEF IN OPPOSITION**

*Of Counsel:*

BRUCE J. ENNIS, JR.  
JENNER & BLOCK  
21 Dupont Circle, N.W.  
Washington, D.C. 20036  
(202) 223-4400

BERYL WEINER \*  
SELVIN, WEINER & RUBEN  
A Partnership including  
Prof. Corporations  
2029 Century Park East  
Suite 1700  
Los Angeles, CA 90067  
(213) 277-1555  
*Attorneys for Respondent*  
*Selvin & Weiner*  
\* Counsel of Record



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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Nos. 91-616 and 91-635

IN RE THE MARRIAGE OF DILLER

DOROTHY DILLER,  
and *Petitioner*,  
STANLEY Z. DILLER,  
*Petitioner*,

---

SELVIN & WEINER, a Prof. Corp.,  
and *Respondent*,

ROBINSON, ROBINSON & PHILLIPS, INC.,  
*Respondent*.

---

On Petition for Writ of Certiorari to the  
Second Appellate District Court of the State of California

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This brief is filed on behalf of respondent Selvin & Weiner ("S&W"), a professional corporation, in opposition to related petitions for certiorari filed by Stanley Z. Diller ("Husband"), No. 91-616, and by Dorothy Diller ("Wife"), No. 91-635. Both petitions ask the Court to overturn a judgment entered in a marital dissolution proceeding between Husband and Wife insofar as the judgment orders payment of attorneys' fees and costs to S&W, the attorneys who represented Wife in

that proceeding, and to respondent Robinson, Robinson & Phillips ("RR&P"), the attorneys who represented Husband in that proceeding, to be paid from petitioners' community property.

Each petitioner contends that payment of fees and costs to its *own* attorney from their community property violates the Due Process Clause of the Fourteenth Amendment.<sup>1</sup> The questions presented are worded differently, but in essence, each petitioner argues that it was denied an opportunity to use *independent* counsel to present evidence, cross-examine, and challenge the reasonableness of the fee award requested by its own trial counsel, in violation of the Due Process Clause.

### SUMMARY OF ARGUMENT

This case does not meet any of the Court's traditional criteria for granting certiorari. To the contrary, the decision below, of an intermediate state court, does not conflict with any other state or federal decision. Point I. The question presented is of importance only to the parties, and was correctly decided on the basis of unique facts that are unlikely to arise again. Point III. Finally,

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<sup>1</sup> In their briefs to the California Court of Appeal, neither petitioner contested payment of fees and costs from their community property to the attorney for the other petitioner. Wife's opening brief at pages 1, 2 n.3, and 42-43; Husband's opening brief at pages 2, 18 and 33. Thus, if the petitions are confined, as they should be, to the questions petitioners briefed below, the petitions raise purely academic questions; even if the relief petitioners sought below had been granted by the California Court of Appeal, respondents S&W and RR&P would still have been paid in full from the community property. In addition, Wife expressly acknowledged below that she was "*not* by this appeal questioning S&W's [her attorneys'] entitlement to fees or the actual amount of fees awarded." Petition for Rehearing, at 2 n.2 (emphasis added). Thus, there is no Article III case or controversy between Wife and S&W. Wife in effect asked the California Court of Appeal to issue an advisory opinion that the procedures used by the trial court to determine S&W's fees violated the Due Process Clause, but she conceded that the fees so determined were correct.

petitioners have expressly waived the due process objections on which their petitions are based. Point II.

## **REASONS FOR DENYING THE WRIT**

The petitions seriously distort the factual record and omit material facts on which the decision below was squarely based. However, it is not necessary to detail all of those distortions and omissions in order to demonstrate that the petitions should be denied, for three independent reasons.

### **I. THERE IS NO CONFLICT.**

There is *no conflict* regarding the requirements of the federal Due Process Clause in these circumstances. Petitioners point to other cases in which other courts have decided, on common law or statutory interpretation grounds, to allow independent counsel to oppose fee applications by trial counsel, but none of those cases held that the federal Due Process Clause requires that result.

### **II. PETITIONERS HAVE TWICE WAIVED ANY RIGHT TO ASSERT THE DUE PROCESS QUESTION THEY ASK THE COURT TO RESOLVE.**

Petitioners have waived any due process objections they might otherwise assert by entering into a written waiver which expressly authorized the trial court to decide all disputed fees issues using the "abbreviated trial procedures" specified in that waiver, and by failing to object when the trial court later used those abbreviated procedures to determine the reasonableness of the fee requests.

#### **A. Petitioners Have Waived Any Due Process Objections By Entering Into A Written Waiver.**

It is undisputed that petitioners personally signed a document titled "Consent, Waiver And Stipulation Re: Abbreviated Trial, Etc." ("Waiver"). 1 App. 192-200. The express purpose of that Waiver was to abbreviate

the time required to complete what had already been an unusually long, bitterly contested, and expensive litigation. The Waiver specified the issues to which the Waiver would apply, and expressly included all disputes “concerning attorneys’ fees and litigation costs, the reasonable value thereof, the necessity thereof, the evaluation thereof, and the assessment, if any, to either party, their respective attorneys and/or to the community.” Waiver, Para. 25. The Waiver specified that the Court would permit a maximum of three days of trial time on these fees issues, and specified that petitioners would be permitted to take the depositions of both trial counsel (S&W and RR&P), but limited each deposition to a maximum of three hours. *Id.*

The Waiver contemplated that the parties would follow the procedures specified therein, but expressly specified that “the parties, by signing this agreement, hereby acknowledge that *the court will have full discretion to limit direct and cross-examination and the introduction of other evidence* to carry out the intent and purposes of this agreement.” Waiver, p. 1 (emphasis added).

Finally, the Waiver itself expressly acknowledges, and it is undisputed, that before signing the Waiver, Husband and Wife both “consulted with counsel independent of their respective trial attorneys,” and entered into the Waiver “based upon such consultation.” Waiver, Para. 26.<sup>2</sup> The Waiver was entered as an Order of the Court, and neither the Waiver nor the Order has ever been questioned or appealed.

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<sup>2</sup> “Both petitioner and respondent have consulted with counsel independent of their respective trial attorneys as to the wisdom and ramifications of entering into this stipulation, and based upon such consultation, each hereby agrees that he and she have read and understood this stipulation and the benefits and risks of the procedure contemplated and outlined herein, and that each further waives his or her respective rights to object to the abbreviated trial procedure as set forth herein.”

Thus, petitioners expressly waived any objections they might otherwise have had to the procedures used by the trial court to determine the reasonableness of fees, by explicitly giving the trial court "full discretion" in that regard. Not surprisingly, the California Court of Appeal stressed this explicit waiver in rejecting petitioners' due process arguments in that court.<sup>3</sup> Either independently, or as an adequate and independent state ground supporting the judgment below, petitioners' waiver makes this an inappropriate case for review.

**B. Petitioners Have Waived Any Due Process Objections By Failing To Object To The Procedures Used By The Trial Court.**

At no time did either petitioner, or independent counsel acting for either petitioner, ask to cross-examine S&W or RR&P, attempt to present any evidence in opposition to the applications for fees and costs filed by those firms that the trial court refused to receive, make any offer of proof regarding those applications, object to not being permitted to participate in the fees hearing on January 8, 1988, or object to the awards of attorneys' fees and costs contained in the judgment. 17 RT 4178-4343; 4398-4440; 19 RT 4931-33; 4891; 4 App. 959.

Thus, even if petitioners had not previously entered into an explicit waiver giving the trial court "full discretion" concerning these matters, their failure to offer

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<sup>3</sup> "The parties by their stipulation of October 19, 1987 conferred upon the court the jurisdiction to determine the necessity and reasonableness of the attorney fees and to allocate payment to either party or to the community. Additionally the parties agreed that 'the court will have full discretion to limit direct and cross-examination and the introduction of other evidence. . . .' This agreement was signed by both parties and their counsel. Additionally each party consulted their counsel prior to signing the stipulation."

any additional evidence, or to object at any point to the procedures the trial court actually used, constitutes a separate waiver of any due process objections they might otherwise assert. Again, either independently or as an adequate and independent state ground, their waiver makes this case an exceedingly inappropriate vehicle for resolving the constitutional question presented in the petitions.

### III. THE DUE PROCESS QUESTION RAISED BY PETITIONERS IS NOT AN IMPORTANT QUESTION OF NATIONWIDE SIGNIFICANCE THAT REQUIRES REVIEW BY THE COURT AT THIS TIME.

Even if petitioners had not waived the due process question they ask the Court to resolve, that question is not of urgent importance to anyone other than the parties involved.<sup>4</sup>

First, petitioners have not shown that this question arises frequently; indeed, there is no showing that it has arisen at all, in any other case. Nor have petitioners shown that it is important for the Court to consider the question now, rather than after it has been considered by other lower courts.

Second, even apart from the waiver problems noted above, this case would be a very poor vehicle for addressing this due process question, because the judgment below is an intensely fact-specific judgment that is grounded in the unique facts of this unusual case.<sup>5</sup>

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<sup>4</sup> Indeed, except as an academic exercise, or as a matter of principle, the question is apparently of little or no actual significance even to the parties. See note 1, *supra*.

<sup>5</sup> As the lower courts stressed, the substantial fees incurred in this case were generated by the unrelenting hostility of the petitioners, who directed their trial counsel to litigate every conceivable issue. California Court of Appeal at App. 5, and 8-10, in No. 91-635. Trial counsel repeatedly attempted to narrow the issues in order to avoid costly and unnecessary litigation, but their clients

Third, the decision below was correctly decided. The Due Process Clause does not require the active participation of independent counsel in the circumstances presented by this case. Here, the trial court “had substantial evidence before it to determine the necessity, reasonableness and amount of the attorney fees and costs,” and the “parties *were* afforded due process in the setting of the fees by the court.”<sup>6</sup> The trial counsel had submitted sworn declarations and hundreds of pages of exhibits in support of their fee applications;<sup>7</sup> there were “several days” of trial testimony regarding fees, including testimony of Husband’s independent counsel and of Wife’s adviser;<sup>8</sup> and “[b]oth trial counsel took the stand and were cross-examined by the other counsel as to attorney fees and costs.”<sup>9</sup> Finally, although the trial court had expressly authorized the independent counsel for Husband and for Wife to take depositions of trial counsel on fees issues for use at trial, they chose not to do so.<sup>10</sup>

In these circumstances, it is not surprising that the trial judge, who had overseen all of the litigation and was thus intimately familiar with the necessity for and quality of all work performed by trial counsel,<sup>11</sup> “decided he

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insisted on a no-holds-barred strategy. *Id.* Trial counsel were *not* attempting to run up their fees; to the contrary, on numerous occasions, trial counsel unsuccessfully asked their clients, and then the trial court, to relieve them of responsibility. 3 RT 701:26-702:13; 5 RT 1075:27-1076:13; 7 RT 1634:19-1635:13; 1637:5-28; 1640:2-18; 10 RT 2426:8-2429:24; 16 RT 4132:23-24; 17 RT 4365:2-4370:1.

<sup>6</sup> California Court of Appeal, at App. 18, 21, in No. 91-635 (emphasis added).

<sup>7</sup> 2 App. 493 to 3 App. 931; 4 App. 989-1112; 4 App. 1113 to 5 App. 1417; 2 Supp. App. 2329-2610; 4 Supp. App. 3060.

<sup>8</sup> 17 RT 4178-4343; 17 RT 4398-4449; 4 App. 959.

<sup>9</sup> California Court of Appeal at App. 18, in No. 91-635.

<sup>10</sup> 19 RT 4927.

<sup>11</sup> *Straub v. Straub*, 213 Cal.App.2d 792 (1963); *Pope v. Pope*, 107 Cal.App.2d 537, 539 (1951).

did not need any additional evidence to determine the reasonableness and necessity of attorney fees and costs and their allocation.”<sup>12</sup>

In view of these facts, the California Court of Appeal correctly decided that petitioners had been given a fair and meaningful opportunity to challenge the fee applications submitted by their trial counsel, had they chosen to do so, and had not been denied due process of law.

#### **IV. THE PETITIONS CONTAIN NUMEROUS MISSTATEMENTS AND OMISSIONS.**

Pursuant to Rule 15 of the Rules of this Court, respondent notes that the petitions contain numerous misstatements and omissions, including those listed below. However, respondent will not burden the Court with argument concerning those misstatements and omissions because, for the reasons stated above, the petitions should be denied even if they contained no misstatements or omissions.

1. Husband and Wife have not disclosed the limitations they made in the scope of their respective appeals: Husband did not appeal portions of the judgment in favor of S&W; Wife did not appeal portions of the judgment in favor of RR&P.

2. Both Wife and Husband filed numerous documents requesting the trial court to make orders for attorneys' fees and costs under the authority of the Waiver, and California Civil Code §§ 4370 and 4370.5, based either on the financial need of the requesting party or on the misconduct of the opposing party.

3. The trial court found there were enormous delays and obstructions in the trial that were caused by the reprehensible conduct of Husband and Wife, not by any actions of their attorneys, who were expressly found not to have been at fault for any delays.

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<sup>12</sup> California Court of Appeal at App. 18, in No. 91-635.

4. The “due process” claims asserted by both Husband and Wife were not raised before the trial court.

5. At no time before (or after) the January 8, 1988 fees hearing did the independent counsel for Husband or Wife ever attempt to schedule a deposition of anyone, including S&W or RR&P, even though they were expressly advised by the trial court that they had a right to take any deposition they wished.

6. At no time before the judgment, or after the judgment in post-judgment proceedings before the trial court, did the independent counsel for Husband or Wife ever attempt or even request to cross-examine either of the attorneys of record, nor did they ever attempt or even request to present any evidence (orally or in writing) in opposition to the applications for attorneys’ fees and costs.

7. At no time did either independent counsel ever make any offer or proof or file any document or objection to the awards of attorneys’ fees and costs contained in the judgment.

8. Contrary to the implication at page 2 of Husband’s petition that only counsel of record advised the parties with respect to the Waiver, each party had their own independent counsel (2 RT 328:5-14; 333:21-24; 3 RT 568:7-21; 7 RT 1641-66), who actively participated in negotiations and modifications of the Waiver. 7 RT 1741:5-1760:27; 1761:4-11; 1777:17-27; 1778:1779:6

9. The total value of community assets involved was over \$40 million, consisting of a wide variety of investments. 4 Supp. App. 2972; 5 Supp. App. 3158-72.

10. The trial court found that the “unrelenting, bitter belligerency” of Husband and Wife, Wife’s “unprovable and unrealistic” claims (App. at 1433), and Husband’s “attempts to control, dominate, and even to obstruct” (*id.*) made the pre-trial proceedings and trial “difficult,

oppressive and frustrating” (*id.* at 1435) and “caused . . . unreasonable delays and consumption of trial and lawyer time.” (*Id.* at 1433.)

11. For instance, Husband was admonished many times for interrupting the trial court and/or otherwise inappropriately addressing the trial court; for his failure to comply with discovery orders; for his failure to pay the court reporter; for uncontrolled outbursts; for his failure to respond appropriately to questions; for his refusal to cooperate and provide documents to Wife’s attorney; for his insistence on wasting time or otherwise incurring attorneys’ fees on unimportant or insignificant issues; and for failures to appear in court at all, or on time. See 2 App. 525-34 and 4 App. 1121-43.

12. The trial court found that Wife (in conjunction with her nonlawyer advisers) was “obsessed” with numerous claims that Husband was “secreting, concealing, mismanaging and misappropriating community property assets.” 6 App. at 1432. The trial court also found that Wife and her nonlawyer advisers “carried their suspicions much too far,” requiring her attorneys to seek evidence that did not exist and to assert “unprovable claims of misconduct by respondent.” *Id.* In addition, the trial court found that Wife’s “inability or unwillingness to give much testimony or to recall many facts or events occurring before or after the date of separation are unfortunate and have caused the court to question the credibility of much of her testimony and the validity of many of her contentions and claims.” 6 App. at 1440.

13. The trial court also found that Husband and Wife insisted that their attorneys present “bizarre, venal, evasive evidence each party felt was necessary often despite their own lawyers contrary advice.” 6 App. 1485:8-12.

14. Both Wife and Husband were admonished many times by the trial court for wasting court time and attorneys’ fees because of the issues they raised and/or their uncompromising attitude in this litigation.

15. Husband and Wife are extremely litigious: during the preceding 7 years Wife and/or Husband were parties in 110 separate lawsuits in the Los Angeles Superior Court. 2 Supp. App. 2247.

16. On November 30 the hearing on interim fees and costs scheduled for December 4 was announced in open court with both Husband and Wife present. 16 RT 3947:14-17.

17. Mr. Saul, Wife's independent counsel, stated that he opposed S&W's interim fee motion (17 RT 4370-73), and asked that the hearing be postponed until late the following week so that he could prepare an opposition for Wife. 17 RT 4374-75. The trial court agreed to continue the hearing to December 10. 17 RT 4377.

18. On December 10 Mr. Saul and Mr. Anteau, Husband's independent counsel, filed oppositions to the interim fee motions. 2 App. 468 and 461. The reasonableness or necessity of the fees and costs sought by S&W was not challenged by Mr. Saul (2 App. at 468), but was challenged by Husband's counsel. 3 Supp. App. 2648-53; 2667-73.

19. On December 21, after considering the oppositions to the interim fee and costs requests, the trial court entered its Order for Payment of Interim Attorneys' Fees and Litigation Costs. 4 App. 967-81.

20. Contrary to the suggestions in the petitions that the trial court did not hold hearings on the final attorneys' fee and cost issue, by mid-December the time limit for hearings on this issue had already been exceeded. On December 2, 3 and 4 and on December 15 there was extensive evidence on the attorney fee issue consisting of two days of testimony from Mr. Sigel (17 RT 4178-4343),  $\frac{1}{2}$  day of testimony of Husband's independent counsel, Mr. Anteau (17 RT 4398-4449), then an additional day of testimony of Mr. Anteau, and of Joseph Gold, Wife's adviser. 4 App. 959.

21. From December 17 to January 8, Mr. Saul chose not to file any document or make any statement challenging either (1) the right of either counsel of record to ask for a final order for attorneys' fees and costs on behalf of their respective clients or (2) the reasonableness and necessity of any of the amounts claimed. Mr. Saul (and Mr. Anteau) chose not to take any depositions and therefore did not examine or cross-examine anyone.

22. Contrary to the statement in Husband's petition (at page 6) that the lawyers were asked to leave the courtroom, the trial judge specifically invited both independent counsel to remain in the courtroom. 19 RT 4933:9-11. Mr. Saul did address the trial court to ask to speak to his client, but he did not register any objection or make any offer of proof. 19 RT 4933:6-23. Mr. Anteau even testified on the attorneys' fee and litigation cost issue during that day, but also failed to make an objection or offer of proof. 19 RT 4933:20-23; 4891:8-19; 5002-5017.

23. Although Mr. Saul did file objections to the interim award of fees, he did not file any objection whatsoever to the final fee hearing.

24. There were four days of earlier testimony on the reasonableness, necessity and allocation of fees and costs (17 RT 4174-4343; 4398-4449; 4 App. 959), which exceeded the time allocated by the Waiver.

25. Declarations and written filings, which were the primary means of offering evidence, demonstrate that the challenges of the two law firms to each other's fees and costs were not cursory or collusive. In fact, they were quite contentious. 4 App. 997-1012; 1123-53; 4 Supp. App. 2871-2893.

26. The transcript of the January 8 hearing demonstrates that Mr. Anteau testified strenuously against Wife's fee and cost request (19 RT 5002-5017); that Mr. Robinson challenged Mr. Weiner about major components of his charges: what appeared to be unusually

high phone charges (19 RT 4949:18-4950:12); what activities justified a charge of \$193,510 in two months (19 RT 4950:13-4952:4); the basis for the hourly charge for word processing (19 RT 4954:9-26); the justification for the charge for air conditioning expenses during weekend work sessions (19 RT 4956:14-4957:3); the basis for charging interest on the unpaid balance (19 RT 4957:4-4958:15; 4965:9-25); and the basis for the large photocopying charge. (19 RT 4958:16-4963:15.)

27. The trial court also conducted an examination of Husband regarding his claim that some discovery conducted by S&W was necessary. 19 RT 4967:6-4972:3. The trial court and the two counsel of record then conducted examinations of various persons, related to who was responsible for missing documents and whether S&W had made unnecessary requests for documents. 19 RT 4975:11-5034:28. The hearing was not cursory or collusive.

28. On January 12, 1988, both parties filed post-trial briefs that requested orders for attorneys' fees and costs on behalf of their respective clients and opposed the fee requests of the other. 4 Supp. App. 2972; 3100.

29. At closing argument on January 15, 1988, both counsel of record requested an order for payment of attorneys' fees and litigation costs on behalf of their respective clients. Contrary to the implication of the statement in Husband's petition at page 6 that "neither party's trial lawyer questioned the fees requested by the other," both S&W and RR&P were instructed by the trial court not to repeat arguments contained in documents already filed. The attorneys therefore referred the trial court to the arguments and evidence contained in prior filings in support of their respective fees requests and in opposition to the fee requests of the other. 20 RT 5056:25-5060:21; 5110:16-5113:22.

30. Because of prior conduct of Husband and Wife, the trial court imposed a restraint on the transfer of

community assets. The trial court was concerned that community assets would be dissipated by the parties and not used to satisfy community liabilities, and appointed a receiver. See discussion at 6 Supp. App. 3469:1-13. The receiver was ordered to take possession of certain community assets and satisfy certain community liabilities, including the liability to the attorneys and accountants. 6 App. 1569-70.

31. A decision by this Court would have no effect on how Wife or Husband will be obligated for their fees and litigation costs under the judgment. One month *after* its entry, Wife and Husband agreed that, *regardless of this Court's ruling* they would reallocate their respective debt for the fees and costs under the judgment. 6 App. 1592. The ultimate result for the two parties will be the same regardless of whether this Court considers the entire judgment, or considers the portions Husband and Wife have actually appealed, or does nothing.

### CONCLUSION

The petitions in Nos. 91-616 and 91-635 should be denied.

Respectfully submitted,

BERYL WEINER \*  
 SELVIN, WEINER & RUBEN  
 A Partnership including  
 Prof. Corporations  
 2029 Century Park East  
 Suite 1700  
 Los Angeles, CA 90067  
 (213) 277-1555  
*Attorneys for Respondent*  
*Selvin & Weiner*  
 \* Counsel of Record

*Of Counsel:*  
 BRUCE J. ENNIS, JR.  
 JENNER & BLOCK  
 21 Dupont Circle, N.W.  
 Washington, D.C. 20036  
 (202) 223-4400